No. 84-2001

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLISON C. COLLARD and JULIA A. COLLARD,

Petitioners,

– against –

THE INCORPORATED VILLAGE OF FLOWER HILL; THE BOARD OF TRUSTEES; WILLIAM R. HOWE, BUILDING INSPECTOR; HERBERT ASH, THOMAS J. WALSH, ROBERT S. CAINE, ALFRED E. RUNGE, and THE ZONING BOARD OF APPEALS OF THE INCORPORATED VILLAGE OF FLOWER HILL; and JOHN M. FARRELL, JR., ESQ., VILLAGE ATTORNEY,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF FOR GRANTING THE WRIT OF CERTIORARI

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I. INTRODUCTION

The Petition for a writ of certiorari represents Petitioners' most sincere effort not only to obtain a fair adjudication of their civil rights claim against parties whom they allege have conspired to deprive them of their constitutional rights, but also to present to this Court, in the clearest fashion possible, an important and timely question concerning the relationship between the doctrines of federal abstention and res judicata. This effort has evoked from Respondents, a governmental entity and its officials, a Brief in Opposition which is thoroughly inaccurate, disingenuous, irresponsible, and an insult to this Court. It misrepresents the facts of this case and the holdings of the courts below. It attempts to distract the Court from focusing on the important issue raised herein by seeking

to ridicule and deride Petitioners. It raises sham, baseless arguments as purported alternative bases for this Court's declining to consider the important issue presented by the Petition. And, lastly, when Respondents do make some attempt to confront the legal issue presented by the Petition, the sole answer they can muster to counter our argument that the courts below ignored the teaching of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), that, in the face of an application of the abstention doctrine, the reservation of federal claims for federal adjudication need not be explicit, is the thoroughly incredible argument, never suggested below, that this aspect of England was overruled by a footnote in a case, Migra v. Warren City School District Board of Education, 465 U.S. ____, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), which did not involve application

of the abstention doctrine and which had nothing to do with the important legal question presented herein.

In this Reply, we respond only to the more significant new arguments and factual misstatements presented by Respondents in their Brief. However, we would point out that our failure here to respond in every particular to Respondents' Brief should not be taken as a concession concerning the accuracy or fairness or reasonableness of anything stated therein.

II. ARGUMENT

1. Migra v. Warren City School District Board of Education, 465 U.S. ____ (1984), Did Not Overrule This Court's Holding in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), That, in the Face of an Application of the Abstention Doctrine, The Petitioners' Reservation of Their Federal Claim for Federal Adjudication Need Not Be Explicit

At page 11 of their Brief, Respondents make the remarkable argument that the

quite clear teaching of England that an explicit reservation is not necessary to reserve a federal claim in the face of abstention, England, supra at 421, has been overruled by a footnote in Migra, supra, 104 S.Ct. at 898, n. 7, which is in no way inconsistent with anything in England and which had absolutely nothing to do with the facts before the Court or the issue presented in Migra. The footnote relied upon reads:

> "In the event that a §1983 plaintiff's federal and state law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, e.g., England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964)." (Emphasis added)

This is consistent with England's teaching that a plaintiff can preserve his federal claim for federal adjudication by such an explicit reservation. England, 375 U.S. at 421. It is not inconsistent with England's additional teaching that, while such an explicit reservation will "in all events" suffice, it "is not indispensible." Id. This issue, i.e., what will suffice to preserve a federal claim for federal adjudication in the face of abstention, was not presented in Migra, and plainly this footnote in Migra cannot seriously be understood by Respondents as any sort of considered reevaluation and rejection by the Migra court of England's very thoughtful teaching that "an explicit reservation is not indispensible." 375 U.S. at 421.

Moreover, this aspect of England makes perfectly good sense. As England

makes plain, it is not the purpose of the abstention doctrine to deprive the plaintiff of a federal forum for his federal claim. The election whether to litigate his federal claim in state or federal court is the plaintiff's. Here, the function of an explicit reservation on the state court record is merely to "forestall any conclusion that he has elected not to return to the District Court." England, 375 U.S. at 421. It is not simply some sort of formalistic ritual -- and, indeed, England does not even state how or in what specific manner such an explicit reservation should be made. Accordingly, where it is clear that the Plaintiffs did not present their federal claim to the state courts and all parties concerned were aware of the outstanding, unresolved federal claim with every expectation of resuming the federal action, as was the case here, it serves

no legitimate purpose in terms of either abstention or res judicata considerations to hold that a plaintiff in this situation should be deprived of a federal forum for the adjudication of his federal claim.

Of course, in retrospect, it is apparent that Petitioners would have been better advised to have gone through the otherwise purposeless act of placing on the record of the Article 78 proceedings an explicit statement of their intent to return to the district court and further pursuing their still pending civil rights claim in the federal forum. Had they done that there would be no question now, we submit, but that they are entitled to a federal adjudication of their claimed deprivation of their civil rights. However, as Petitioners pointed out to the courts below, they did not believe their entirely distinct civil rights

claim, which sought, inter alia, damages and named additional defendants, was a claim which could be adjudicated in that proceeding, which was in the nature of a special proceeding rather than a plenary action. In any event, under England, it was clear that such an explicit reservation was not required.

Furthermore, with the district court having declined to dismiss Petitioners' civil rights claim, but instead having merely stayed the prosecution of that claim and retaining jurisdiction, it was entirely appropriate for Petitioners and Respondents to expect, as they did, that at the conclusion of the state court proceedings, they could return to the federal court for an adjudication of their civil rights claim.

Respondents present no evidence to show that their view of Migra having

overruled England has ever been followed by any court. West v. Village of Morrisonville, 728 F.2d 130 (2d Cir. 1984), which Respondents claim (p. 11), "reaffirmed the necessity of an explicit reservation" said simply that an express reservation was possible. Respondents cite Heimbach v. Chu, 744 F.2d 11 (2d Cir. 1984), for the position that "a litigant who has raised a constitutional issue in a state action may not relitigate the issue in federal court." Here, Petitioners never litigated their federal claim in any court, as Respondents attempt to deceive this Court into believing. Thus, Heimbach is totally inapplicable.

Hence, everything that Petitioners did was reasonable and consistent with England. Now, however, it is urged that Migra, decided after the district court's stay order, overruled England and thereby

puts Petitioners out of court for failing to do what England specifically declared was not required. We submit that Migra was not intended to overrule this aspect of England, which is analytically sound and entirely fair and practical. Even if footnote 7 of Migra was intended to have that effect, it is most unjust that this so veiled and unclear "holding" should be given retroactive application to Petitioners.

We would urge that Migra in no way undermines this aspect of England -- and the grant of the writ and a summary reversal in this case would suffice to make this clear to litigants and lower courts. However, should this Court find that this aspect of England should be reconsidered, we submit this argues equally forcefully for the granting of the writ to consider: (1) whether this part of England's holding should be

overruled and (2) assuming it should be overruled, whether such a ruling should be applied retroactively. In any event, even under Respondents' own so radical view of the continued force of this aspect of England, this is plainly a case presenting issues sufficiently important to warrant the granting of the writ of certiorari.

2. Plaintiffs Did Not Litigate Their Civil Rights Claim in State Court

Undoubtedly, recognizing the absurdity of their argument that Migra overruled so much of England as holds that in the face of abstention the reservation of federal claims for federal adjudication must be explicit, Respondents falsely claim (Opposition Brief, pp. 12-13, 15-16) that Petitioners actually litigated the civil rights claims set forth in the second cause of action in their federal Complaint

in state court. This is patent nonsense, squarely rebutted by the decisions herein of both the district court (A-11-43) and the Court of Appeals (A1-4), both of which are premised on the clear assumption -- which is why each found Migra controlling -- that this is a claim that could have been but was not raised in the state court Article 78 proceedings, as well as by the record in the state court proceedings, wherein not only were the parties not identical to those in this federal suit, but also it is clear from the state court's decision (A44-65) that nothing similiar to Petitioners' claim of a conspiracy to deprive them of their civil rights was there tendered for adjudication. Indeed, it is supremely ironic that on the very date on which Respondents filed their Brief in Opposition in this Court, July 22, 1985, the district court, in a related proceeding in which the Re-

spondents are seeking an award of attorneys fees from Petitioners pursuant to 42 U.S.C. §1988, made it crystal clear that it was of the view that Petitioners did not litigate their civil rights claim in state court. See Memorandum of Decision and Order, 82 Civ. 2143, E.D.N.Y., July 22, 1985 (Mishler, J.), at pp. 3 and 5, noting that Allen v. McCurry, 449 U.S. 90, 97 n. 10 (1980), "left open" the question of the preclusive effect of a state court judgment where a §1983 plaintiff could have but did not actually raise the §1983 issue in the state proceedings, and explaining its decision not to grant attorneys' fees here by pointing out that a "reasonably objective litigant," such as Petitioners, "would reasonably believe, before the Migra decision was issued, that he or she was not precluded from litigating issues which were not actually litigated in the prior state action."

(emphasis supplied).

The second cause of action alleged in Petitioners' Complaint and Amended Complaint alleges a conspiracy by these Respondents, for improper and unlawful purposes, to deprive Petitioners of their civil rights. That claim has never been adjudicated in any court, state or federal. For Respondents to suggest in their Brief that in fact this claim was "fully litigated" is simply dishonest. Respondents know this is not so. For Respondents to make this sort of argument in this Court simply cheapens the discourse to which this Court and the parties who appear before it are entitled. What has occurred heretofore in this case in the courts below represents, we believe, simply a good faith omission on the part of those courts to consider or fully appreciate the application here of what this Court actually held in England.

Respondents' perhaps understandably desire to retain the victory they have thus far obtained in this matter does not, and cannot, justify their attempt to mislead this Court concerning a critical fact relevant to this Court's decision on this Petition.

3. Petitioners Asserted a Claim Under 42 U.S.C. §1983, Argued the Dismissal of Their Claim Under Fed.R.Civ.P.12(b)(6) Before the Court of Appeals and this Court, Nevertheless the Court of Appeals Never Ruled on this Issue

Again, we must charge Respondents with attempting to mislead this Court. At Point II in their Brief (pp. 16-19), Respondents argue that Petitioners failed to state a claim under §1983, that the Court of Appeals affirmed the dismissal of Petitioners' claim on this ground and that this issue has not been presented by Petitioners to this Court.

It would be a mistake to believe that Petitioners brought their federal civil

rights claim solely because they were denied a building permit or because they challenge, per se, the right of a municipality to constitutionally enact zoning regulations. Petitioners do not challenge the zoning law of the Village of Flower Hill "on its face," but, rather, "as applied" to Petitioners. Petitioners' Statement of Facts to the courts below and this Court (Petitioners' Main Brief, pp. 8-11), assert, inter alia, that following the refusal of an initial building plan submitted by Petitioners to the Village, Petitioners revised their plans to conform to the Village Zoning Code. In response to this second plan, the Village redefined the law and its applicability to Petitioners by effectively "rotating" what was considered the rear and side yards of Petitioners' property from their traditional boundary so as to allow the Village to hold the revised building plan

as again nonconforming.

In their Amended Complaint that was before both the District Court and the Court of Appeals, Petitioners alleged, inter alia, that:

> "...with deliberate malice toward Plaintiffs [the Village Attorney, Defendant Farrell] instructed the building inspector to disregard the traditional rear and side yards of Plaintiffs' property with a deliberate intent to discriminate against Plaintiffs and with a scheme to deny Plaintiffs equal protection under the law redefined the Village Code, redrew the rear and side yard boundaries of Plaintiffs' property, as diagonal lines across Plaintiff's [sic] property, and in collusion with Defendant Building Inspector HOWE, instructed him to advise Plaintiffs that their proposed building violated Section 86-12, of the Village Code. [reference to exhibit of complaint] Such oppressive methods by HOWE and FARRELL were deliberately designed to force Plaintiffs to have to seek a variance for their second proposed building plan since the second proposed building plan of Plaintiffs as realized by Defendants FARRELL and HOWE were not prohibited by the Declaration of Covenants on the land."

Such allegations clearly present a cognizable claim under the federal civil rights statutes upon which relief can be granted, Burt v. City of New York, 156 F.2d 791 (2d Cir. 1946); Riccobono v. Whitpain Tp., 497 F.Supp. 1364 (E.D.Pa. 1980). These facts having been presented to each level of the federal judiciary, it is error on the part of Respondents to assert that dismissal of Petitioners' federal claims under Rule 12(b)(6) has gone unchallenged.

Under no fair reading of the opinion of the Court of Appeals in this case can it be said that the Court held, in the alternative, that Petitioners' Complaint should be dismissed for failure to state a claim upon which relief can be granted.

4. Respondents Lack Any Immunity From Federal Civil Rights Laws For Violation of Petitioners' Constitutionally-Guaranteed Rights

Respondents' various claims of immuni-

ty must be rejected. First, these are affirmative defenses which must be pleaded. Here, there has never been an answer filed and, thus, these claims are not properly before the Court. Second, the claims of absolute privilege are without any basis in law and, thus, do not bar equitable relief and the award of costs against Respondents. Third, all that any of the Respondents can claim, and this is most assuredly true with respect to the Village Attorney and the Building Inspector, is a qualified privilege. It is obvious that this defense presents issues which should not in the first instance be decided by this Court -- and indeed cannot be decided on this record.

Moreover, the Court stated in Harlow v. Fitzgerald, 457 U.S. 800 (1982) that public officials are not shielded from liability when their conduct violates "clearly established statutory or

constitutional rights." Id. at 815-18.

Petitioners' Amended Complaint alleges bad faith, acts of malice, etc. that may be deemed beyond the scope of Respondents' duties. Their arguments of good faith are baseless in view of the allegations of bad faith presented in Petitioners' Amended Complaint. Such bad faith is a bar to any claim of qualified immunity.

III. CONCLUSION

Accordingly, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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